INDEX.

PAGE

Respondent's Statement of the Case 1

The Questions Presented and the Contested Issues... 4

Argument:

I. Petitioner did not raise and preserve his Federal constitutional questions in accordance with well settled and inherently reasonable rules of Illinois appellate judicature. Therefore this Court lacks jurisdiction to entertain them..... 5

II. Petitioner fails to demonstrate denial of due process 8

III. The judgments in Cases Nos. 25503 and 25505 are not assailed and should not be disturbed..... 14

Conclusion 15

Cases Cited.

Betts v. Brady, 316 U. S. 455 .....8, 10

Bute v. Illinois, October, 1947, Term, No. 398 .....8, 9, 10, 12, 13, 14

Carter v. Illinois, 329 U. S. 173 .....9, 10, 11

City of Chicago v. Peterson, 360 Ill. 177 6

City of Chicago v. Terminiello, 396 Ill. 41 ..... 6, 7

City of Chicago v. Terminiello, 332 Ill. App. 17, 74 N. E. (2d) 45 7

DeMeerleer v. Michigan, 329 U. S. 663 11

Economy Dairy Co. v. Kerner, 371 Ill. 261 .....7, 12

Foster v. Illinois, 332 U. S. 134 ..... 8, 9

Herndon v. Georgia, 295 U. S. 441 .....5, 11

House v. Mayo, 324 U. S. 42 9

Johnson v. Zerbst, 304 U. S. 458 13

Marino v. Ragen, ... U. S. ..., 68 S. Ct. 240 13
Parker v. Illinois, October, 1947, Term, No. 270 ... U. S. ..., 68 S. Ct. 708..... 5
Pennsylvania Railroad Co. v. Illinois Brick Co., 297 U. S. 447, 463 6
People v. Bird, 335 Ill. 447 6
People v. Burnett, 394 Ill. 420 .....7, 12
People v. Corbett, 387 Ill. 41 12
People v. Creviston, 396 Ill. 78 12
People v. Davies, 350 Ill. 48 6
People v. Girard, 326 Ill. 197 .....7, 12
People v. Jiras, 340 Ill. 208 6
People v. Mahoney, 364 Ill. 202 .....7, 12
People v. Orlando, 380 Ill. 107 6
People v. Phelps, 388 Ill. 618 .....7, 12
People v. Reilly, 348 Ill. 153 .....7, 12
People v. Shines, 394 Ill. 428 6
People v. Shoffner, No. 30509, not yet reported (Appendix II) 13, 29-32
People v. Thompson, 392 Ill. 589 12
People v. Van Horn, 396 Ill. 496 12
People v. Wilson, No. 30257, not yet reported (Appendix I) 13, 17-29
People v. Witt, 394 Ill. 405 6
Phelps v. Board of Appeals, 325 Ill. 625 .....7, 12
Powell v. Alabama, 287 U. S. 45 .....8, 10
Rice v. Olson, 324 U. S. 786 .....8, 10
Rooney v. Ragen, 158 Fed. (2) 346 8
White v. Ragen, 324 U. S. 760 ..... 5, 8

BLEED THROUGH – POOR COPY

STATUTES CITED.

United States Constitution, Sixth Amendment.....9, 13
United States Constitution, Fourteenth Amendment..
.....9, 10, 13
Illinois Constitution, Art. II, section 9..... 13
Illinois Revised Statutes, 1947, Ch. 38, par. 730, p. 1302 12
Illinois Revised Statutes, 1947, Ch. 110, par. 199, p. 2539 8

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 59

DONALD LOFTUS,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF OF RESPONDENT

RESPONDENT'S STATEMENT OF THE CASE.

Petitioner, who was indicted for two separate bank robberies and for two burglaries alleged to consist in the felonious entries, respectively, culminating in such bank robberies, informed the Court upon arraignment that he had counsel in Chicago who could not then be present, asked a continuance, received "temporary counsel" appointed by the Court, conferred with such counsel, and entered "tem-

porary pleas of not guilty" (R. 5, 13, 19, 25). He was thirty-four years old at the time (R. 8).

His first two trials involved, respectively, the charges of the bank robberies (R. 1-4, 9-12). On the first of these trials he was represented by one David Feldman, it not appearing certainly whether Feldman was retained by petitioner or appointed by the court, and one Johnson, who was appointed by the court to assist Feldman (R. 6). On the second trial, Feldman having telegraphed the court that he could not attend, petitioner was defended by Johnson alone (R. 14).

On each of the last two trials, Johnson asked to be excused from further service. The court offered petitioner "time in which to obtain counsel." Petitioner declined this offer, stating, not that he was without means, but that "his funds are tied up." He did not amplify this allusion to his resources, nor did he state at this time, under oath or otherwise, that he had no means to procure counsel (R. 20, 26).

The trial court stated of record in each of the last two trials that, "hearing the testimony under the circumstances of the case," was "disinclined to appoint any member of the bar as defendant's counsel owing to the circumstances in the previous cases where counsel was appointed" (R. 20, 26).

Petitioner was then tried, without representation by counsel, on the two burglary charges. The evidence in these cases was presumably substantially the same as that adduced on the robbery charges, which involved the same two holdups. Petitioner declined to examine jurors and accepted jurors who had sat either on the grand jury which returned the indictments or the first two petit juries. He did, however, examine witnesses (R. 20, 26).

Nothing indicates that petitioner's acceptance of these jurors was in ignorance of his rights; for on the second trial

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for bank robbery, which had preceded the burglary trials, when he was represented by counsel, some jurors who had been previously connected with his case were excused for cause and others were accepted (R. 14). And nothing would support an inference that the trial court did not tell him that he need not accept these jurors.

After verdicts of guilty were returned in all four cases, and before sentence, petitioner was represented by counsel. **Although post verdict motions for new trial and in arrest of judgment were made, it does not appear that the constitutional questions were raised or suggested** (R. 7, 15, 21, 27).

Failure to raise these questions in the trial court raised a *jurisdictional impediment* to their consideration by the Illinois Supreme Court on writ of error (see Argument, *post*).

Sixteen years after his conviction, petitioner sued out a writ of error to review these four judgments of conviction. As we demonstrate in the Argument, Point I, *post*, petitioner did not, except by a general allusion to the State and Federal due process clauses as invalidating the entire proceedings below, present any State or Federal constitutional question to the Illinois Supreme Court. Under well settled law of Illinois, such a generality is not sufficient to raise, present and preserve constitutional questions for review. (See Argument, *post.*) Nor did petitioner argue any of his alleged errors as violative of constitutional rights or as presenting constitutional questions. He did not set up, specially claim and thereby preserve his contention that any of the supposed errors constituted denial of due process, State or Federal.

That court, following a rule to which it and many other State courts of review have steadfastly adhered since early times (see Argument, *post*), held insufficient a generalized

invocation of the State and Federal due process clauses, without specification as to how or wherein due process was denied and without assailing on constitutional grounds either the enactment, construction or application of a State statute to which the lower court's procedure had admittedly conformed, and therefore did not consider petitioner's assignments of error as resting upon constitutional grounds. The Illinois Supreme Court did treat, discuss and decide the errors assigned by petitioner, which were numerous. But it did not, and under its well settled rules could not, view them in constitutional aspects because petitioner did not specifically present them in those aspects.

Since petitioner had counsel in his first two trials No. 25503 (R. 1-9) and No. 25505 (R. 9-17), no substantial Federal question is presented as to his conviction in those cases.

The Questions Presented and the Contested Issues.

The questions presented and the contested issues are:

1. DID PETITIONER ASSERT THE FEDERAL CONSTITUTIONAL QUESTIONS IN ACCORDANCE WITH WELL SETTLED RULES OF ILLINOIS APPELLATE PROCEDURE AND THEREBY PRESERVE THEM FOR REVIEW HERE?

2. IF PETITIONER DID EFFECTIVELY PRESERVE HIS QUESTIONS FOR REVIEW HERE, DOES THE RECORD DEMONSTRATE A DENIAL OF DUE PROCESS IN HIS CONVICTION?

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ARGUMENT.

I.

Petitioner did not raise and preserve his Federal constitutional questions in accordance with well settled and inherently reasonable rules of Illinois appellate judicature. Therefore this Court lacks jurisdiction to entertain them.

The rule that Federal questions arising in State courts must be raised and preserved in accordance with the State's principles of adjective law, including the State's rules of appellate procedure, is a limitation on this Court's jurisdiction to entertain such questions on *certiorari* to or appeal from the State court. *Herndon* v. *Georgia*, 295 U. S. 441, discussed and applied to the instant case in the margin.[1] *White* v. *Ragen*, 324 U. S. 760; *Parker* v. *Illinois*, this Term No. 270, ... U. S. ..., 68 S. Ct. 708, not yet reported.

In *White* v. *Ragen*, *supra*, this Court held that where the Illinois Supreme Court denies relief, not upon an adverse adjudication of substantive Federal constitutional questions but because such questions are not appropriately

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1 In *Herndon* v. *Georgia*, 295 U.S. 441, this Court held that it lacked jurisdiction to entertain petitioner's due process questions where petitioner, who had been convicted of seditious utterances in violation of a Georgia statute, challenged the constitutionality of the statute in the Georgia trial court only by a general assertion that it was unconstitutional, which assertion this Court recognized as an insufficient specification under the Georgia law to preserve the question for review here; and he did not challenge the constitutionality of the statute in the State Supreme Court at all until after he filed his petition for rehearing.

This Court held that the federal questions of freedom of speech, although very substantial and of great importance to the country, were not preserved in accordance with the Georgia law and therefore dismissed the case for want of jurisdiction.

Mr. Justice Cardozo dissented but only upon the ground, wholly absent here, that in his view of the case, the question of the constitutionality of the State statute did not arise until the Georgia Supreme Court's opinion in Herndon's case read the statute as dispensing with a necessity for "clear and present danger," as an element of the crime of sedition. He therefore thought that the question could not have been raised before the opinion gave occasion for petitioner's contention on application for rehearing.

asserted in that court, this Court lacks jurisdiction to review; but in such cases, neither the Illinois Supreme Court's decision nor this Court's denial of *certiorari* thereto bars access to the United States district courts on a petition for *habeas corpus*.

In *Pennsylvania Railroad Co.* v. *Illinois Brick Co.*, 297 U. S. 447, this Court, declaring itself to be without jurisdiction to consider constitutional questions not raised in an Illinois trial court as required by the Illinois procedure, said at page 463:

> "• • • As the highest court of the State declined to consider them" [i.e., Federal constitutional questions] "because not raised in the circuit court or presented to it in accordance with practice that unquestionably was well established and reasonable, this court is without jurisdiction to consider either of them.• • •"

Petitioner was attended by counsel at the time that the judgments and sentences were pronounced against him.

Illinois has steadfastly enforced in both criminal and civil cases the following rules, which are similar to the rules in many other states:

1. A mere general invocation of or address to State or Federal constitutional provisions, such as the State or Federal due process clauses, as denunciatory of the entire proceeding below, without argument of any specified constitutional questions as such, is insufficient to present any constitutional question.[2]

2. Where an action of an inferior tribunal is in accordance with a State statute as construed by the Illinois Supreme Court, such action will be upheld unless it is specially claimed that the statute is, either by its text and terms or as it is or has been construed and applied in the pending or other cases, unconstitutional.[3]

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[2] *People* v. *Witt*, 394 Ill. 405; *People* v. *Shines*, 394 Ill. 428; *People* v. *Bird*, 335 Ill. 447; *People* v. *Orlando*, 380 Ill. 107.

[3] *City of Chicago* v. *Terminiello*, 396 Ill. 41; *City of Chicago* v. *Peterson*, 360 Ill. 177; *People* v. *Jiras*, 340 Ill. 208; *People* v. *Davies*, 350 Ill. 48.

3. A plaintiff in error (or an appellant in a civil case) is not entitled to have considered, but on the contrary waives, errors assigned but not argued.[4]

4. Constitutional questions must be raised in the court below, *and the State or Federal Constitution must be invoked in that court*, or such question cannot be considered on writ of error or appeal.[5]

A very pertinent Illinois decision with respect to the requisite mode of asserting a Federal and State constitutional question is the Illinois Supreme Court's recent decision in *City of Chicago* v. *Terminiello*, 396 Ill. 41. Terminiello was convicted of a violation of a city ordinance in that, as appears by a fuller statement of the facts in *City of Chicago* v. *Terminiello*, 332 Ill. App. 17, 74 N. E. (2d) 45, he made a speech denouncing certain racial minority groups. A certificate of the trial judge is necessary to authorize a direct appeal to the Supreme Court of Illinois where the conviction is under a city ordinance (not, as in the instant case, a statute prohibiting a felony) in the absence of a constitutional question.

In deciding that Terminiello had not appropriately asserted and preserved his contention that his prosecution and conviction infringed his constitutional right of free speech, the court, after observing that appellant did not "specifically contend that the ordinance is unconstitutional," declared that a mere argument that his conviction violated due process of law did not raise a direct and specific constitutional question which gave the court jurisdiction on direct appeal; nor did it challenge the constitutionality of the enactment, construction or application of the legislative measure. The cause was transferred to the

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[4] *People* v. *Phelps*, 388 Ill. 618; *People* v. *Burnett*, 394 Ill. 420; *People* v. *Reilly*, 348 Ill. 153; *People* v. *Mahoney*, 361 Ill. 202; *People* v. *Girard*, 326 Ill. 197.

[5] *Phelps* v. *Board of Appeals*, 325 Ill. 625; *Economy Dairy Co.* v. *Kerner*, 371 Ill. 261.

Appellate Court because the constitutional question was not properly raised.

[The Illinois Supreme Court properly retained the instant case even though it deemed no constitutional question properly presented because all cases involving convictions of felonies are reviewable in the Supreme Court of Illinois on writ of error directly to the trial court, without the intermediacy of the Illinois Appellate Court, even though no constitutional question is involved. (Ill. Rev. Stats. 1947, Ch. 110, par. 199, page 2539)].

It must be borne in mind that these rules limit and inhibit the Illinois Supreme Court's power of appellate review. If petitioner in fact suffered an invasion of his Federal constitutional rights, he may apply directly to a United States District Court. *White* v. *Ragen*, 324 U. S. 760, makes this clear. (See *Rooney* v. *Ragen*, 158 Fed. (2) 346, holding that a District Court in Illinois must act by *habeas corpus* where Illinois' writ of error or other remedies are not plainly adequate.)

II.

Petitioner fails to demonstrate denial of due process.

We do not retreat from our contention that petitioner has not properly asserted and preserved his constitutional questions. (Point I, *ante.*) But supposing, for the sake of argument only, that those questions are properly here, we say that the record does not present any matter that would exempt petitioner from this Court's holding in *Betts* v. *Brady*, 316 U. S. 455, *Foster* v. *Illinois*, 332 U. S. 134, and *Bute* v. *Illinois*, this term No. 398, decided April 19, 1948, not yet reported, and assimilate it to *Powell* v. *Alabama*, 287 U. S. 45, and sequent cases.

The *Betts*, *Foster* and *Bute* cases, when compared and contrasted with *Powell* v. *Alabama*, 287 U. S. 45, *Rice* v. *Ol-*

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son, 324 U. S. 786, and kindred cases, declare that the Sixth Amendment's categorical guaranty of a right to counsel in criminal cases is not imported into the concept of due process which the Fourteenth Amendment imposes upon the States. In cases involving claimed unconstitutional denial to right to counsel in State courts, the *critique* of Federal due process is inquiry whether there is an *affirmative showing* that the failure to tender or the refusal to appoint counsel resulted in a violation of the fundamental "scheme of ordered liberty." *Bute* v. *Illinois*, this term, No. 398, *supra*, not yet reported.

At the time of his arraignment, petitioner indicated in the trial court that he had a lawyer in Chicago named Ryan. This occurred on April 9, 1932. The court did not rush him to trial in the absence of Ryan (cf. *House* v. *Mayo*, 324 U.S. 42) but continued the case until April 18, 1932 (R. 5, 13, 19, 25). In the interim, Feldman undertook petitioner's representation, fairly inferably but not certainly at the request of the court. And the trial court appointed Johnson to assist Feldman (R. 6). Although Feldman did not participate in petitioner's second trial, Johnson continued to represent him (R. 14).

Thus petitioner went through two trials with the advice of and representation by counsel.

At the commencement of the third trial, the trial court made the finding, admittedly somewhat cryptic, that, "hearing the testimony, under the circumstances of the case," it was "disinclined to appoint any member of the bar as defendant's counsel to appear as counsel in this case." Whereupon the court offered to give petitioner time to get counsel (R. 20). (It is not clear whether the "testimony" referred to was the testimony in the previous trials or upon a hearing as to petitioner's resources.)

In *Carter* v. *Illinois*, 329 U. S. 173, and in the *Foster* case, 332 U. S. 134, this Court held that, where only the common

law record alone was before the Illinois Supreme Court, refusal to appoint counsel will not be presumed to have occurred without judicial solicitude for the rights of an accused guaranteed by the Fourteenth Amendment. It adhered to this point of view in the *Bute* case, *supra*.

If it is necessary to draw reasonable and legitimate inferences, sanctioned by the *Carter* case, as to why the trial court was "disinclined to appoint any member of the bar as defendant's counsel owing to the circumstances in the previous cases where counsel was appointed" (R. 26), we may well infer that the trial judge became convinced, from his actual observations of petitioner on the witness stand, that petitioner was as able to conduct his defense as was the defendant Betts in *Betts* v. *Brady*, 316 U.S. 455. And it is by no means unreasonable to suppose that the first two trials or testimony heard by the trial court with reference to the withdrawal of court appointed counsel disclosed that petitioner had in fact means available with which to employ counsel. It is highly probable that the evidence convinced the court that the defendant was in possession of and claiming as his own large sums of money, claimed by others to be the spoils of one or both of the robberies. If so, the petitioner can not complain that the trial court disregarded his assertion of ownership of these funds. This would be true, or so at least it would seem to us, as long as petitioner persisted in affirming that the funds were his even though jurors had rejected his claims in funds to which the adverse claimants of the funds were not parties.

The *Bute* case emphasizes the distinction between capital and non-capital cases.

In such case as *Powell* v. *Alabama*, 287 U. S. 45, the circumstances were extreme. Ignorant Negro youths in a hostile community, facing death by hanging, had only the farcical appointment of "every member of the bar" to sym-

bolize, or perhaps more properly to mock and burlesque, the right to counsel. In *Rice* v. *Olson*, 324 U.S. 786, the accused's case involved an exceedingly difficult question as to whether Federal jurisdiction over the *situs* of the crime was exclusive, a question calling for highly sophisticated skill in constitutional and Federal statutory law. In *DeMeerleer* v. *Michigan*, 329 U. S. 663, this Court emphasized the youth and inexperience of a lad who, not having even consulted with a lawyer, was "hurried through unfamiliar proceedings" in a murder trial.

Neither presumption nor [illegible]y compulsory inference aids petitioner's argument here that the fact that certain jurors in the last two trials had previously served as grand or petit jurors in petitioner's earlier cases either constituted a denial of due process *per se* or demonstrated petitioner's need for counsel. It cannot be supposed that petitioner was unmindful of his right to accept these jurors. In petitioner's second trial, in which he was represented by counsel, petitioner's counsel had challenged some jurors who had sat in the first trial and accepted others. Nor can we suppose that his explicit acceptance of these jurors was without advice as to his rights from the trial court.

Petitioner has not preserved a bill of exceptions or other authenticated transcript of what happened upon his trials. This Court has consistently refused to surmise, contrary to the strong presumption that due process is afforded, that the trial court was unmindful of the constitutional rights of the defendant. In *Herndon* v. *Georgia*, 295 U.S. 441, and in *Carter* v. *Illinois*, 329 U.S. 173, this Court held that the failure to preserve a bill of exceptions made impossible and therefore prevented a review here of very substantial constitutional questions that would have been considered

had such bill of exceptions been included in the record. Since Illinois is under no federal obligation to afford appellate review at all (*Bute* v. *Illinois*, and argument, Point I, *ante*), *a fortiori* she may require a bill of exceptions, need not furnish the same *gratis*, and may make its absence a basis for denying review of matters that cannot be fully considered without such a bill. *Herndon* v. *Georgia, supra*, so holds, even where the alleged error actually appeared by the common law record but was not cognizable under the State's practice in the absence of a bill of exceptions *eo nomine*.

A writ of error is in Illinois, as it was at common law, a new suit. A plaintiff in error must, in order to avail himself of it, not only avoid express waiver or positive release of error, express or passive, but must affirmatively set up, specially claim and declare the constitutional rights which he invokes. (*People* v. *Thompson*, 392 Ill. 589.)

Tested by these well settled principles, which are not only traditional in Illinois law but are historic throughout most of the states of the Union, petitioner's writ of error in the instant case was insufficient to present and claim his alleged rights in their supposed constitutional aspects.

Illinois' "right to counsel statute" (Ill. Rev. Stats., 1947, Ch. 38, par. 730, p. 1302), as authoritatively construed by the Supreme Court of Illinois, does not require the appointment of counsel in non-capital cases unless the defendant requests such appointment and states under oath his inability to procure the same without appointment by the court. (*People v. Corbett*, 387 Ill. 41; *People* v. *Van Horn*, 396 Ill. 496; *People* v. *Creviston*, 396 Ill. 78). Petitioner did not contend either that the trial court's action was not in conformity with this statute or that the statute was, either generally or as applied in petitioner's case, unconstitutional. He made only the general assertion that he

had been denied State and Federal due process in the proceedings below.

Although he was represented by counsel after the verdicts and before sentence, the record fails to show that any denial of due process was claimed in the post-verdict motions for new trial and in arrest of judgment. Failure to raise constitutional questions below waives them (cases cited *ante*, note 6, p. 7.)

Since this Court last had occasion to consider the matter of Illinois' remedies available to Illinois prisoners claiming denial of the Federal constitutional right to counsel (*Marino v. Ragen*, ... U.S. ..., 68 S. Ct. 240, not yet officially reported, and *Bute* v. *Illinois*, this term No. 398), the Illinois Supreme Court has twice made clear its sense of obedience to this Court's exposition of Federal due process in the matter of the right to counsel. (*People* v. *Wilson*, No. 30257, decided March 18, 1948, not yet reported, reprinted in full as Appendix I, *post*, pp. 17 to 29; *People* v. *Shoffner*, No. 30509, not yet reported, and reprinted in full as Appendix II, pp. 29 to 32.)

In these cases the court states that it perceives no purely lexical difference of substance in the slightly variant verbiage of the Sixth Amendment and Illinois' constitutional guaranty of the right to counsel.[6] But the Illinois Supreme Court, consulting the history of the right to counsel in Illinois and the traditions of her jurisprudence, reads the Illinois constitution less broadly than this Court reads the Sixth Amendment in *Johnson* v. *Zerbst*, 304 U. S. 458.

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[6] Illinois Constitution of 1870, Article II, Section 9, as follows:
"In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation and to have a copy thereof, to meet the witnesses face to face, and to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

The Illinois Supreme Court reads this Court's decisions as declaring that, while the right to counsel is well nigh absolute in the Federal courts, the Federal due process clause enjoins upon States the duty to appoint counsel in those cases in which the particular context of circumstances requires such appointment in order to prevent a miscarriage of justice. This is all that the Fourteenth Amendment requires. (*Bute* v. *Illinois, supra.*)

Petitioner has failed to demonstrate that, if the whole of the record of his convictions had been preserved and presented on this record or if his right to *de novo* inquiry into the circumstances of his trial were availed of in a *habeas corpus* proceeding in a Federal district court, it would appear *first*, that he was denied the substance of due process and, *second*, that such denial was a material ingredient in his conviction.

Of course petitioner's guilt or innocence is immaterial. But the context of circumstances in which petitioner was tried are essential to the appraisal of all the facts which must precede any pronouncement that due process has been denied. That context does not appear from and is not fairly inferable from the present record.

III.

The judgments in Cases Nos. 25503 and 25505 are not assailed and should not be disturbed.

Since petitioner had counsel in his first two trials, Nos. 25503 and 25505, the writ of certiorari should be dismissed for want of any substantial Federal question or the judgments in those cases should be affirmed.

CONCLUSION

For the reasons urged in this brief, it is respectfully submitted, alternatively, that

(1) This Court should dismiss this writ of *certiorari* for want of jurisdiction resulting from the fact that the Federal constitutional questions were not properly raised and presented in the Illinois courts

or

(2) If this Court can take cognizance of the constitutional questions, it should hold that the record does not disclose a denial of due process of law.

In either case, of course, this Court's judgment should be without prejudice to petitioner's right of access to the Federal district courts by *habeas corpus* if there exist facts, not apparent here, of such exigency as to make his conviction really a denial of due process.

Respectfully submitted,

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APPENDIX I.

Docket No. 30257—Agenda 26—January, 1948.

The People of the State of Illinois, Defendant in Error, v. Henry L. Wilson, Plaintiff in Error.

MR. CHIEF JUSTICE MURPHY delivered the opinion of the court:

On June 16, 1943, plaintiff in error pleaded guilty in the circuit court of Madison County to an indictment charging grand larceny. He was sentenced to the penitentiary for the statutory indeterminate term for such offense of one to ten years. (Ill. Rev. Stat. 1947, chap. 38, par. 387.) He has sued a writ of error out of this court to have the record of his conviction reviewed. The record presented is limited to the placita, indictment, order fixing bail, recital of facts showing arraignment, and the judgment. The grounds urged for reversal are, that (1) in a criminal prosecution the court has a duty to inform the accused of his right to assistance of counsel, and (2) the failure of the court to advise the accused of his right to assistance of counsel deprives him of his liberty without due process of law.

The record shows the indictment was returned May 28, 1943, that it charged plaintiff in error and his codefendant, Alberta Louise Wilson, with having stolen various items of merchandise of a total value of $23.80. On June 16, 1943, both defendants were before the court and each was furnished with a copy of the indictment and lists of witnesses and jurors. Following the recital of such preliminaries in the record, there appears the following: "Defendant Henry Wilson is duly arraigned, says he pleads guilty and defendant Alberta Louise Wilson, by leave of court withdraws plea of not guilty and pleads guilty of said charge. Court fully advises defendants as to their respective rights and consequences, yet defendants so advised, persist in entering pleas of guilty and same so recorded by court and entered on such pleas, court finds said defendants Henry L. Wilson and Alberta Louise Wilson guilty of the crime of larceny in manner and form as charged in the indictment and the age of defendant Henry L. Wilson to be thirty-six years and the defendant Alberta Louise Wilson to be

thirty-three years and the value of the property stolen by them to be $23.80." This review is limited to the rights and interest of Henry L. Wilson.

Throughout the history of this court the fundamental law has made provision for the right of every accused to have assistance of counsel. The provisions of section 9 of article VIII of the constitution of 1818, and of section 9 of article XIII of the constitution of 1848 were identical. They were: "That in all prosecutions, the accused hath a right to be heard by himself and counsel." Section 9 of article II of the constitution of 1870 is: "In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel." It will be noted that the provision of the present constitution differs slightly in language from the two preceding constitutions, but it is the same right that was intended to be protected in each instance. It assures to every accused the right to have the assistance of counsel to advise him as to the nature of the charge preferred, of the plea to enter, and if a plea of not guilty is entered to have counsel prepare and present his defense on the trial.

The first part of section 2 of division XIII of the Criminal Code (Ill. Rev. Stat. 1947, chap. 38, par. 730,) was adopted in its present form in 1874 and has been in force continuously since that date. It provides: "Every person charged with crime shall be allowed counsel, and when he shall state upon oath that he is unable to procure counsel, the court shall assign him competent counsel, who shall conduct his defense. In all cases counsel shall have access to persons confined and shall have the right to see and consult such persons in private." In 1929, the second paragraph of the section was added. (Laws of 1929, p. 344.) Since it deals exclusively with the appointment of counsel for indigent defendants indicted for a capital offense, its provisions need not be set forth in this case.

In the one hundred thirty years that have passed since the first constitutional provision was adopted, a large number of cases have been before this court involving questions as to whether the accused's right to counsel has been transgressed upon. It is impossible within the reasonable confines of an opinion to analyze and discuss any considerable number of those cases, but, to demonstrate the care and

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caution with which an accused's right to counsel has been safeguarded, reference will be made to a few.

White v. *People,* 90 Ill. 117, decided in 1878, was a case where the trial court had restricted the time for oral argument to the jury. It was contended the limitation had deprived the defendant of having his case fully and fairly presented. It was said: "The plaintiffs in error had an undoubted right, under the very bill of rights itself, and by the law of the land, to defend by counsel, and to insist such counsel should have reasonable opportunity to discuss before the jury both the facts and the law of the case. This was a constitutional and substantial right of which no court could properly deprive them." Also see *Meredeth* v. *People,* 84 Ill. 479.

In *North* v. *People,* 139 Ill. 81, referring to the part of the criminal code above quoted, (par. 730) it was said: "We are not to assume that this (statute) was intended to be a mere empty formality, and that the counsel thus appointed should be compelled to act without being allowed reasonable time within which to understand the case and prepare the defense." See, also, *Feinberg* v. *People,* 174 Ill. 609; *People* v. *Bopp,* 279 Ill. 184; *People* v. *Brislane,* 295 Ill. 241; *People* v. *Blumenfeld,* 330 Ill. 474; *People* v. *Celmars,* 332 Ill. 113.

In *People* v. *Kurant,* 331 Ill. 470, it was said: "A privilege most important to a person accused of crime, connected with his trial, is to be defended by counsel. (Citation.) If an accused person is to have counsel he should be in a position to make a complete defense." In appointing counsel for an indigent accused, it is the duty of the court to appoint counsel that has sufficient ability and experience to fairly represent the defendant, present his defense and protect him from oppression. (*People* v. *Blevins,* 251 Ill. 381; Compare *People* v. *Laures,* 289 Ill. 490; *People V. Nitti,* 312 Ill. 73.) That an accused may be shown to be guilty does not justify the court's action in denying him an opportunity to present his defense through counsel. *People* v. *Long,* 346 Ill. 646.

Akin to the requirement that an accused shall have the right to counsel is that part of section 4 of division XIII of the Criminal Code (Ill. Rev. Stat. 1947, chap. 38, par. 732,) which provides that "In cases where the party pleads guilty such plea shall not be entered until the court shall

have fully explained to the accused the consequences of entering such plea; after which, if the party persists in pleading guilty, such plea shall be received and recorded and the court shall proceed to render judgment and execution thereon, as if he had been found guilty by a jury." In *People* v. *Kurant,* 331 Ill. 470, it was held, that, where an accused had tendered a plea of guilty under a misapprehension as to the consequences of his plea, and immediately after he had obtained the advice of counsel asked leave to change his plea, under such circumstances the request should be granted.

In *People* v. *Kawoleski,* 310 Ill. 498, defendant pleaded guilty to a violation of the Illinois Prohibition Act. He signed a jury waiver and was sentenced to jail on his plea of guilty. About twenty days thereafter, he moved to vacate the judgment and for a new trial. By affidavit filed in support of the motion, he stated that he did not understand the English language "well," that he had no counsel to represent him and was ignorant of the proceedings. The motion was denied by the trial court and on writ of error was affirmed. The substance of the holding was that defendant had not met the burden of proving that by reason of certain particular circumstances, he had not had a fair trial.

In *People* v. *Lavendowski,* 326 Ill. 173, defendant tendered a plea of guilty to violation of the liquor law. The plea was entered without the aid of counsel and, after counsel had been employed to represent the defendant, a motion was made for leave to withdraw the plea of guilty and in support thereof defendant showed that he did not understand the English language, that he did not know the effect of his plea of guilty, that he did not have counsel and that the consequences of his plea had not been explained to him. The motion was overruled and defendant was sentenced to jail. On review in this court, it was claimed that the defendant had been deprived of his constitutional right to counsel. In discussing the right of an accused to counsel, and in referring to the constitutional provision and the statutory enactment, it was said that those provisions did "not place upon the court the duty to proffer the services of counsel, but where there has been a motion for leave to withdraw a plea of guilty, the fact that the defendant

did not have counsel and was not informed that he could have such assistance, if such is a fact, is a matter which, with all the facts surrounding the case, is to be considered in determining whether it was an abuse of judicial discretion to refuse to permit the withdrawal of the defendant's plea."

The principle announced in the *Lavendowski* case had been applied in several cases prior to that time. In *Gardner* v. *People,* 106 Ill. 76, the defendant entered a plea of guilty to a charge of murder. He had no counsel, did not understand or speak the English language, the colloquy between the court and the accused being carried on through an interpreter. A few days after the plea of guilty had been entered, counsel was appointed for the accused and immediately an application was made for leave to withdraw the plea of guilty. The motion was denied by the trial court. On review, doubt was expressed as to whether the defendant understood "the difference between a charge of murder and a mere charge of taking life, or that one might be proved guilty of killing another and yet not be guilty of any offense at all, or at least of the offense of murder." It was held that, under the particular circumstances shown, leave should have been granted to withdraw the plea of guilty.

In *Krolage* v. *People,* 224 Ill. 456, the same principle was applied where the defendant had pleaded guilty to a charge of embezzlement and had been sentenced to the penitentiary. The showing was that he had misunderstood the possibility that he might be sentenced to the penitentiary.

In *People* v. *Kurant,* 331 Ill. 470, defendant entered a plea of guilty to a charge of murder. After the plea had been made, counsel was appointed, presumably to represent the defendant in the taking of testimony in aggravation or mitigation of the crime. Within a few days counsel moved to withdraw the plea of guilty and enter a plea of not guilty. The trial court denied the motion but on review it was held the circumstances under which the plea of guilty had been made, one of which was that he did not have the assistance of counsel, required the granting of the motion. (Also, see *People* v. *Varecha,* 353 Ill. 52.) An application to withdraw a plea of guilty is a matter within the sound discretion of the court but, if abused, will be reversed on review. In the following case it was held that there was no abuse of the discretion in denying the motion: *People* v. *Stamatides,* 297 Ill. 582; *People* v. *Bonheim,* 307 Ill. 316.

No case has been cited where, prior to 1944, this court passed upon a question raised on a record as is presented in this case. In that year, *People* v. *Childers*, 386 Ill. 312, came to this court by writ of error to review a common-law record. Defendant had been sentenced to the penitentiary in 1935 on a plea of guilty to an indictment charging burglary and larceny. The record was silent as to whether defendant knew prior to the entering of his plea that he had a right to counsel, and if unable to employ counsel that the court would appoint same for him. It was contended that since the record did not show that the court had advised defendant of his right to counsel and had not offered to appoint counsel, if he was unable to employ same, the judgment should be reversed. There, as in the present case, there was no claim that the accused had asked for counsel and had been denied, nor was any claim made that the defendant was not capable of understanding the nature of the charge and all the possibilities that might accompany a plea of guilty. The opinion in the *Childers* case cited the *Kawoleski* and *Lavendowski* cases with approval and adopted them as precedents for the principle that the court was not required to proffer counsel to a defendant charged with crime. The effect of such holding was that the failure of the judgment record to show such fact did not *ipso facto* destroy such judgment. Since the *Childers* case was decided there have been more than twenty cases before this court involving questions of the same general pattern presented in that case. We have consistently adhered to the principles announced in those earlier cases.

It is now earnestly contended that the principle announced in the *Childers* case, and followed in subsequent cases, should be overruled. It is argued that the constitutional provision and the statute which proclaims an accused's right to counsel are not given their full import and force unless the court, before accepting a plea of guilty, advises the accused of his right to counsel. Such contention, if sustained, would impose a duty on the court in every criminal case of advising a defendant who appeared before him without counsel of his right to counsel and to proffer him counsel to be appointed by the court, if he was not able to employ same.

The important bearing such question has on the fundamental rights of an accused and the frequency with which

the question arises has prompted us to re-examine our earlier decisions and to reconsider the whole question in the light of certain recent decisions of the Supreme Court of the United States which define the requirements of due process under the fourteenth amendment as applied to persons incarcerated under a record such as the one before us.

Plaintiff in error contends for an interpretation and application of section 9 of article II of the constitution and section 2 of division XIII of the Criminal Code which will accord with the construction the Federal courts have given the sixth amendment to the Federal constitution. The pertinent parts of that amendment are that "In all criminal prosecutions the accused shall enjoy the right * * * to have the assistance of counsel for his defense." In *Johnson V. Zerbst*, 304 U. S. 458, 82 L. ed. 1461, it was said: "The sixth amendment withholds from Federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life and liberty unless he has or waives the assistance of counsel."

It has long been considered that the first ten amendments to the Federal constitution impose a limitation on Federal legislative and judicial power and that the provisions of such amendments have no effect on States or State courts, (*Spies* v. *Illinois*, 123 U. S. 131, 31 L. ed. 80; *Keith* v. *Henkleman*, 173 Ill. 137,) except insofar as those rights and privileges are within the requirement of the due-process clause of the fourteenth amendment or, as said in *Palko* v. *Connecticut*, 302 U. S. 319, 82 L. ed. 288, "as were implicit in the concept of ordered liberty." Unless the requirements of the sixth amendment are eventually to be declared an essential of due process under the fourteenth amendment (see dissent in *Adamson* v. *California*, 332 U. S. 46, 91 L. ed. 1464,) and thereby binding on the States, the State constitutional provision may be construed without regard to the influence of the construction given the sixth amendment by the Federal courts

The language of section 9 of article II and of the sixth amendment safeguard the same right. There is no difference in language which would support a conclusion that the right of an accused to counsel was of any greater extent under one provision than the other. We find that the difference in the conclusions reached by this court in the State pro-

vision and the Federal court on the sixth amendment is more a matter of approach than on any difference in the language of the two provisions.

The rationale of the holdings of this court on the right of an accused to counsel under the State provision is that it is assumed an average accused knows of his rights to counsel and of his right to have counsel appointed for him if he is unable to procure his own. Experience, based on observation and practice, shows that the average person in the every day affairs of life, when apprehended for a criminal offense or when his rights become involved in a civil action, resorts to counsel without having to be told of his right to counsel. Acting on such assumption, this court has held that the burden of asserting the right to counsel rests on the accused and, in that sense, it is said in many of the cases that the right of counsel is a right personal to a defendant which he may waive or claim as he himself elects. (*People* v. *Carter,* 398 Ill. 336; *People* v. *Foster,* 394 Ill. 194; *People* v. *Pond,* 390 Ill. 237.) Recognizing the exceptions, it has been held that where it was shown that an accused had, by reason of his lack of understanding of his rights, including the right to counsel, adopted a course detrimental to his case, such ill-advised action should be stricken from the record and the accused given the right to counsel and to proceed with the advice and assistance of counsel. (See *People* v. *Kurant,* 331 Ill. 470; *Krolage* v. *People,* 224 Ill. 456, and *Gardner* v. *People,* 106 Ill. 76.) As a rule, the question has arisen on a motion or petition of the defendant, supported by proof showing his lack of understanding of his right to counsel. If a court has any doubt as to the mental competency of the accused to understand his rights, then due process would require that the court, on its own motion, advise him as to his right and inform him that if he was not able to procure counsel the court would appoint counsel for him.

In applying the sixth amendment, the Federal courts do not indulge the assumption of competency of the average accused that has been applied by this court. It is tersely stated in *Johnson* v. *Zerbst,* 304 U. S. 458, 82 L. ed. 1461, in the following language: "It (sixth amendment) embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to pro-

tect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." We indulge the same assumption as to the competency of an accused to defend himself but the question raised on this record does not go to plaintiff in error's competency to conduct a defense but is limited to plaintiff in error's knowledge of his right to have the advice and assistance of counsel. There is not a word in the record tending to show that plaintiff in error did not know that he had a right to have the advice of counsel before pleading in the case. It is a well-established principle that all reasonable intendments not contradicted by the record are to be taken in favor of the validity of the judgment, (*People* v. *Throop*, 359 Ill. 354; *People* v. *Gerke*, 332 Ill. 583), and that he who seeks a reversal of a judgment assumes the burden of showing the illegality of the proceeding which resulted in the judgment against him.

Counsel for plaintiff in error envisions a warning in the opinion of *Foster* v. *Illinois*, 332 U. S. 134, 91 L. ed. 1542, wherein the court says: "It is not for us to suggest that it might be desirable to offer to every accused who desires to plead guilty the opportunities for counsel and to enter with formality upon the record the deliberate disclaimer of his need for counsel because of a full appreciation of the meaning of a plea of guilty as expounded by responsible judges." We consider such statement, not in the sense of a warning of a future determination if the State law were not changed, but rather to emphasize the difference between State and Federal questions. We think the succeeding sentence supports this interpretation, where it is said: "Our duty does not go beyond safeguarding 'rights essential to a fair hearing' by the States."

We hold that under the State constitution and section 2 of division XIII of the Criminal Code, there was no duty resting upon the court to advise plaintiff in error of his right to counsel before he entered his plea of guilty, and that the absence from the judgment of the explanation of such right to plaintiff in error does not furnish grounds for reversal. This we believe to be in accord with cases in other jurisdictions having constitutional or statutory provisions similar to ours. (See Annotation in 149 A. L. R. 1403.) We adhere to the principles announced in *People* v.

Childers, 386 Ill. 312, and other cases. As a question of State law, the judgment should be affirmed.

The fourteenth amendment to the Federal constitution is a limitation on the exercise of power by State legislatures and State courts, and it is the duty of a State court to enforce the requirements of that amendment. Questions as to whether plaintiff in error had due process within the meaning of the fourteenth amendment are within the scope of the error assigned in this case. The decisions of the Supreme Court of the United States as to what constitutes due process under the fourteenth amendment control and our discussion now relates to that field.

In *Foster* v. *Illinois,* 332 U. S. 134, 91 L. ed. 1542, the Supreme Court of the United States says that the rationale of the present day application of due process was first expounded in *Powell* v. *Alabama,* 287 U. S. 45, 77 L. ed. 158. In the *Powell* case it was said: "Where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law." To illustrate the necessity of an incompetent accused having a full understanding as to his rights of counsel, it was said in the *Powell* case: "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissable. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceeding against him. Without it, although he is not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true it is of the ignorant and illiterate, or those of feeble intellect."

Assuming that *Powell* v. *Alabama,* 287 U. S. 45, 77 L. ed. 158, embodies the scope of the doctrine of due process as

applied to an accused's right to counsel, we pass to the next problem as to how the Federal court applies that doctrine to a case such as this. *Foster* v. *Illinois,* 332 U. S. 134, 91 L. ed. 1542, furnishes the answer. When that case was before this court on writ of error, (394 Ill. 194,) we affirmed a judgment which, as here, contained a general recital that the defendants had been apprised of their rights and the effect and consequences of a plea of guilty, but it did not contain any specific recital as to the right to counsel. The Supreme Court of the United States, commenting on such fact said: "In this case there is neither proof nor uncontradicted allegation of any such (referring to *Williams* v. *Kaiser,* 323 U. S. 471, 89 L. ed. 398; *Tomkins* v. *Missouri,* 323 U. S. 483, 89 L. ed. 407; *De Meerleer* v. *Michigan,* 329 U. S. 663, 91 L. ed. 471; *Haley* v. *Ohio,* U. S. , 92 L. ed. 239) miscarriage of justice in accepting pleas of guilty. The record of the proceeding plainly imports an observance of due process * * *. There was nothing in the common-law record, on the basis of which the Supreme Court of Illinois rendered its decision, to contradict this account of the proceedings in 1935 (date of sentence.) We thus have in effect the bald claim that merely because the record does not disclose an offer of counsel to a defendant upon a plea of guilty, although the court before accepting the plea duly advised of his 'rights of trial' and the consequences of such a plea, he is 'deprived of rights essential to a fair hearing under the Federal Constitution.' *De Meerleer* v. *Michigan,* 329 U. S. 663, 91 L. ed. 471. We reject such a claim. Most incarcerations are upon pleas of guilty, and probably most such pleas have been made without the felt need of counsel * * *. Our duty does not go beyond safeguarding 'rights essential to a fair hearing' by the States."

The prior decisions of this court, which plaintiff in error earnestly contends are founded on a wrong principle and should be overruled, are, on the records presented, in accord with *Powell* v. *Alabama,* 287 U. S. 45, 77 L. ed. 158; *Betts* v. *Brady,* 316 U. S. 455, 86 L. ed. 1595, and *Foster* v. *Illinois,* 332 U. S. 134, 91 L. ed. 1542, and there is nothing on the record in this case which would justify a reversal of the judgment of conviction on the ground that plaintiff in error had been denied due process of law by not advising him of his right to counsel before accepting his plea of guilty.

Before concluding this case, reference should be made to the general inclination of defendants, who bring their cases to this court by writ of error to review questions of due process under the fourteenth amendment, to rely upon decisions of the United States rendered in review of *habeas corpus* proceedings. Analysis of the *habeas corpus* cases shows that the charge that the accused had been denied due process of law was raised in the trial court by allegations in a sworn petition. Reference to two cases (*Williams* v. *Kaiser*, 323 U. S. 471, 89 L. ed. 398; *Tomkins* v. *Missouri*, 323 U. S. 485, 89 L. ed. 398,) will suffice. In the *Williams* case, the allegations in the petition for writ of *habeas corpus* was: "Prior to his conviction and sentence as aforesaid, the petitioner requested the aid of counsel. At the time of his conviction and sentence, as aforesaid, the petitioner was without the aid of counsel, the Court did not make an appointment of counsel, nor did petitioner waive his constitutional right to the aid of counsel, and he was incapable adequately of making his own defense, in consequence of which he was compelled to plead guilty." The allegation in the petition in the *Tomkins* case was: "The petitioner states that in the proceedings in said circuit court • • • he was not represented by counsel, the court did not make an effective appointment of counsel, the petitioner did not waive his constitutional right to the aid of counsel, and he was ignorant of his right to demand counsel in his behalf, and he was incapable adequately of making his own defense." The lower court, and the court of last resort of the State from which those cases came, had held that the allegations of the respective petitions were not sufficient to require an answer and dismissed or denied the petition without requiring an answer or denial of the charge. The Supreme Court of the United States held that such allegations brought the cases within the doctrine of *Powell* v. *Alabama*, 287 U. S. 45, 77 L. ed. 158, and were sufficient to raise a question of fact as to whether the petitioner had been denied due process of law by reason of having not been capable of understanding his right to counsel and not having the right explained to him. Each of the cases was remanded, with directions to require an answer and take evidence, if a question of fact was raised. It will be observed that the court restricted its conclusions to the allegations of the petition and found them sufficient to require an answer and

evidence, which they said might result in showing that the claim or denial of due process was without foundation. The issue presented on a petition for writ of *habeas corpus* containing allegations in accordance with the doctrine of *Powell* v. *Alabama*, 287 U. S. 45, 77 L. ed. 158, is entirely different from the one presented on the record furnished in this case.

What has been said herein in reference to the constitutional provision and section 2 of division XIII of the Criminal Code applies to noncapital cases. The second subdivision of said section 2, which was added by the amendment of 1929, pertains solely to capital cases and contains a different requirement. See *People* v. *Williams*, No. 30371.

The judgment of the circuit court of Madison County is affirmed.

JUDGMENT AFFIRMED.

APPENDIX II.

Docket No. 30509—Agenda 40—January, 1948.

The People of the State of Illinois, Defendant in error, v. Clarence Shoffner, Plaintiff in Error.

Per Curiam: An indictment returned in the circuit court of Ford County on April 8, 1931, charged that plaintiff in error did, on January 19, 1931, break and enter a store building with the intent to steal, and did take and carry away certain items of personal property having an aggregate value of $10.50. Bail was fixed at $1500 but the record does not disclose whether bail was given or whether plaintiff in error remained in custody. It does appear that on July 18, 1931, he was before the court and acknowledged receipt of a copy of the indictment, list of witnesses and a list of the petit jurors. The judgment contains the following:

"And now in open court the defendant waives arraignment, and states to the Court that he desires to plead guilty to the Crime of Burglary in manner and form as alleged in said indictment.

"And now the defendant after being admonished by the court as to the effect and consequence of his said plea of

guilty, still persists in his said plea of guilty to the crime of Burglary in manner and form as alleged in said indictment, and the defendant states his age to be 25 years.

"It is therefore the order and judgment of this court that the defendant upon his said plea of guilty stand convicted of the crime of Burglary in manner and form as alleged in said indictment and the court finds the age of the defendant to be 25 years."

The judgment concludes with an order sentencing plaintiff in error to the penitentiary for a period of one year to life. In 1947 leave was granted plaintiff in error to prosecute a writ of error forma paperis, and in December, 1947, an authenticated copy of the common-law record was filed in this court. Two errors are assigned for reversal: first, that there was no arraignment, and without such the judgment can not be sustained; second, that plaintiff in error did not have counsel to advise him, that he did not know of his right to counsel, that the court did not advise him of such right, and that he entered his plea without a full understanding of his rights.

The formalities of arraignment as required by the common-law have been changed by section 1 of division XIII of the Criminal Code. (Ill. Rev. Stat. 1947, chap. 38, par. 729.) Where it was formerly required that the indictment be read to the accused, the statute now provides that he be furnished with a copy of the same. It has been said that the furnishing of a copy of the indictment is a better means of informing the accused of the character of the charge than was the former requirement that it be read to him. (*People* v. *Terry*, 366 Ill. 520; *Kelly* v. *People*, 132 Ill. 363.) If the record shows that what was done amounted in substance to an arraignment, it is sufficient. (*Parkinson* v. *People*, 135 Ill. 401.) However, if a case is to be tried before a judge or jury, there must be a plea, for in the absence of same no issue is raised. If the accused pleads guilty, the record must show such plea, for without it a judgment of conviction cannot be sustained. *Hoskins* v. *People*, 84 Ill. 87; *Yundt* v. *People*, 65 Ill. 372; *Johnson* v. *People*, 22 Ill. 314.

It will be observed that the record shows plaintiff in error acknowledged to the court that he had received a copy of the indictment and thereafter entered a plea of guilty. Plaintiff in error contends the words "waives arraignment"

constitutes a waiver of all the essentials of an arraignment, but the recital of the furnishing of a copy of the indictment shows this requirement was not waived nor was the requirement that the record show a plea was entered. These facts appearing of record it is not a case as plaintiff in error contends where the record shows arraignment was waived, but is a case presenting a question as to whether the facts shown are sufficient to amount to an arraignment. We hold that what was done amounted to an arraignment, notwithstanding the recital "arraignment waived." *People* v. *Terry*, 366 Ill. 520.

In discussing the essentials of an arraignment to meet the due-process clause of the fourteenth amendment, it was held in the Terry case that due process of law did not require the people to adopt any particular technical form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself. *Garland* v. *State of Washington*, 232 U. S. 642, 58 L. ed. 772.

The second assignment of error raises the same question determined in *People* v. *Wilson*, No. 30257, in which an opinion was filed this term. On a review by writ of error, the reviewing court is restricted in its examination to the record certified by the trial court. Such record imports verity, and all reasonable intendments not contradicted by the record are to be taken in favor of the validity of the judgment. (*People* v. *Throop*, 359 Ill. 354; *People* v. *Gerke*, 332 Ill. 583.) The rule is that court records, the subject of review as in this case, are to be regarded as so conclusive and final that the existence of the record or the facts recited therein can not be impeached or contradicted by the affidavits of persons, either parties to the record or bystanders, or by notes of a stenographer who reported the proceedings in the trial court, or on the memory of the judge who presided when the record was made. (*People* v. *Flannigan*, 398 Ill. 55; *People* v. *Ambolo*, 343 Ill. 480; *Hubbard* v. *People*, 197 Ill. 15.) This rule precludes our consideration of plaintiff in error's affidavit filed in support of his second assignment of error. Without it the questions presented on this assignment are the same as those presented in *People* v. *Wilson*, No. 30257.

Reference should be made to plaintiff in error's affidavit, for it furnishes an opportunity to again emphasize the dis-

tinction plainly drawn by the cases between questions reviewable on a writ of error and questions of fact that may be tried on a petition for a writ of *habeas corpus* where it is claimed due process has been denied. Plaintiff in error states in his affidavit that he was 26 years of age in 1931 when arrested for this offense, that he was born in a rural section of Kentucky, never had "a systematic schooling" and could not read or write when he pleaded guilty in 1931. He states that during his incarceration he has improved his condition and is now able to read and to understand the affidavit. It was further stated that by reason of his illiteracy when he pleaded guilty he was not able to read the indictment or to know its contents, that he did not have counsel, did not know he had a right to counsel and did not have any money to employ counsel if he had known of such right, that the court did not advise him of his rights, or that counsel would be appointed for him if he requested it. The affidavit concludes that "he was incapable adequately of making his own defense." It is obvious the affidavit was drawn with a view of bringing the case within the doctrine of *Powell* v. *Alabama*, 287 U. S. 45, 77 L. ed. 158, followed in more recent cases including *Williams* v. *Kaiser*, 323 U. S. 471, 89 L. ed. 398, and *Tomkins* v. *Missouri*, 323 U. S. 483, 89 L. ed. 407. The affidavit contains substantially the same facts as were alleged in the petitions for writs of *habeas corpus* in the *Williams* and *Tomkins* cases. The Supreme Court of the United States held that such averments, if proved, were within the doctrine of *Powell* v. *Alabama*, and, being such, required an answer and, if questions of fact were raised, the introduction of evidence. As stated, the affidavit is not available to impeach the record in this review.

For the reasons assigned, the judgment is affirmed.

JUDGMENT AFFIRMED.